



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 14, 2016

Via electronic mail



Via electronic mail

Ms. Patricia Lord
Senior Assistant City Attorney
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RE: FOIA Request for Review – 2016 PAC 41019

Dear [REDACTED] and Ms. Lord:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons stated below, the Public Access Bureau concludes that the City of Naperville Police Department (Department) did not improperly redact information from police reports responsive to [REDACTED] February 16, 2016, FOIA request, with the exception of certain information provided by Department employees.

On that date, [REDACTED] submitted a FOIA request to the Department for police reports relating to a particular case. On February 23, 2016, the Department denied the request in its entirety under 7(1)(d)(i) of FOIA (5 ILCS 140/7(1)(d)(i) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016).

On April 6, 2016, this office sent a copy of the Request for Review to the Department and asked it to provide a detailed explanation of the factual and legal bases for the

assertion of section 7(1)(d)(i) of FOIA together with a copy of the withheld records for our confidential review.

On April 18, 2016, the Department submitted a written response. The Department stated that it had reassessed its position of withholding the records in their entirieties, and furnished a redacted version of the records to [REDACTED]. The records are police reports concerning an alleged battery committed against [REDACTED] which is the subject of a pending criminal case. The Department asserted that it properly redacted portions of the records under sections 7(1)(a), 7(1)(b), 7(1)(c), 7(1)(d)(i), 7(1)(d)(iii), and 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(a), (1)(b), 7(1)(c), (1)(d)(i), (1)(d)(iii), (1)(d)(iv) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016). The response included a letter from the DuPage County State's Attorney's Office (State's Attorney's Office), which also asserted that disclosure of the requested records is prohibited by the discovery provisions in Illinois Supreme Court Rule 415(c), as well as by Rule 3.6 of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct 3.6 (effective January 1, 2010)) and Rule 3.8 of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct 3.8 (effective January 1, 2016)).

On April 25, 2016, this office forwarded a copy of the Department's response to [REDACTED] he did not reply.

DETERMINATION

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2014); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2012). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.*, 176 Ill. 2d 401, 408 (1997). Bare conclusions without a detailed rationale do not satisfy a public body's burden of explaining how exemptions are applicable. *See Rockford Police Benevolent and Protective Ass'n, Unit No. 6 v. Morrissey, et al.*, 398 Ill. App. 3d 145, 151 (2nd Dist. 2010) (citing *Illinois Education Ass'n v. Illinois State Board of Education.*, 204 Ill. 2d 456, 464 (2003)).

Sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA

Sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA exempt from disclosure:

(d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law

enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

(i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency that is the recipient of the request;

* * *

(iii) create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing[.]

"The classification of information as 'law enforcement' or 'investigatory' does not necessarily foreclose access unless it can be shown, in a particular case, that disclosure would interfere with law enforcement and would, therefore, not be in the public interest." *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 536 (2d Dist. 1989). Conclusory statements that the disclosure of records would obstruct a law enforcement proceeding are insufficient to support the assertion of the pending law enforcement proceeding exemption. *Day v. City of Chicago*, 388 Ill. App. 3d 70, 74-77 (1st Dist. 2009).

The Department's and the State's Attorney's Office's claims that disclosure of the complete records would interfere with or obstruct an ongoing prosecution is unsupported by any specific facts. A public body must demonstrate *how* disclosure of records would interfere with or obstruct a criminal prosecution or investigation in order to properly withhold records pursuant to section 7(1)(d)(i) of FOIA. The Public Access Bureau has consistently concluded that the mere commencement of an investigation or prosecution does not constitute clear and convincing evidence that any records are exempt from disclosure. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 33927, issued May 6, 2015; Ill. Att'y Gen. PAC Req. Rev. Ltr. 30811, issued November 21, 2014; Ill. Att'y Gen. PAC Req. Rev. Ltr. 26563, issued November 21, 2013.

The Department also cited section 7(1)(d)(iii), which permits a public body to withhold records if disclosure would "create a substantial likelihood a person will be deprived of a fair trial[.]" However, that assertion is also conclusory and unsupported by specific facts. The Department and State's Attorney's Office have not demonstrated how disclosure of any information in the police reports would create a "substantial likelihood" that the criminal defendant will be deprived of a fair trial. Accordingly, this office concludes that the Department has not sustained its burden of showing by clear and convincing evidence that the records are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA.

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Section 7(1)(d)(iv) of FOIA

Section 7(1)(d)(iv) of FOIA exempts from disclosure information that would "unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies[.]" Witness statements may be withheld in their entireties under section 7(1)(d)(iv) if disclosure "would necessarily result in the disclosure of the identity of the source" of the information and, therefore, "redaction of the [records] cannot be meaningfully accomplished." *Copley Press, Inc., v. City of Springfield*, 266 Ill. App. 3d 421, 426 (4th Dist. 1994). This office has reviewed the un-redacted responsive records provided by the Department, and determined that the identities of individuals who provided information to police could be discerned from the content of the records even if the names of the individuals were redacted. Accordingly, while this office concludes that the Department has not met its burden of demonstrating that portions of the records are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(d)(iii), the Department properly withheld witness statements in their entireties or redact portions of records containing information attributed to witnesses under section 7(1)(d)(iv).

The Department also withheld statements or observations by Department employees. The information provided by Department employees who are merely performing their assigned duties does not require the protection afforded under section 7(1)(d)(iv). *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 26558, issued January 7, 2014, at 3 ("Construing section 7(1)(d)(iv) to apply to individuals who provide information for a[n] * * * investigation pursuant to their duties as public servants would yield [an] absurd result, and statutes should be construed to avoid absurdity."). Accordingly, this office concludes that while the Department properly withheld the information provided by civilian witnesses under section 7(1)(d)(iv), information provided by Department employees must be disclosed.

Section 7(1)(a) of FOIA

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." Because FOIA does not have an exemption containing or referencing either Illinois Supreme Court Rule 415(c) or Rules 3.6 and 3.8 of the Illinois Rules of Professional Conduct, this office construes the Department and the State's Attorney's Office's collective reliance on those rules as asserting section 7(1)(a) of FOIA. *See, e.g., Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 815-16 (4th Dist. 2008) (under section 7(1)(a), "an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated - that is, such a proposed disclosure must be specifically prohibited").

Illinois Supreme Court Rule 415(c)

Illinois Supreme Court's rules "have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). The Illinois Supreme Court has explained:

When interpreting supreme court rules, our court is guided by the same principles applicable to the construction of statutes.

[Citations.] With rules, as with statutes, our goal is to ascertain and give effect to the drafters' intention. [Citation.] The most reliable indicator of intent is the language used, which must be given its plain and ordinary meaning. *People v. Marker*, 233 Ill.2d 158, 164–65 (2009).

Illinois Supreme Court Rule 415(c) provides that "*[a]ny materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody* and be used only for the purpose of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide." (Emphasis added.) The committee comments on the Rule (Ill. S. Ct. R. 415(c), Committee Comments (adopted October 1, 1971)) explain its purpose:

If the materials to be provided were to become, in effect, matters of public availability once they had been turned over to counsel for the limited purposes which *pretrial disclosures* are designed to serve, the administration of criminal justice would likely be prejudiced. Accordingly, this paragraph establishes a mandatory requirement in every case that *the material which an attorney receives shall remain in his exclusive custody*. While he will undoubtedly have to show it to, or at least discuss it with others, he is not permitted to furnish them with copies or let them take it from his office. It should be noted that this paragraph also applies to the State. (Emphasis added.)

The State's Attorney's Office has contended that the police reports have been tendered in discovery and that under Rule 415(c), "counsel for the State and the Defendant are prohibited from releasing the documents requested."¹ However, the FOIA request was submitted to the Department, not the State's Attorney's Office or defense counsel. Further, *the Department* has not asserted that any of the requested records were received by an attorney for the Department in

¹Letter from Robert B. Berlin, State's Attorney, DuPage County, to Neil P. Olson, Assistant Attorney General (April 12, 2016), a1 3.

discovery. Rather, the Department generated the materials while investigating the alleged battery. The Department's interpretation of Supreme Court Rule 415(c) as prohibiting police departments from providing records generated by police departments in response to FOIA requests is contrary to the plain language of the rule and unsupported by any legal authority. Because the Department has not demonstrated that any of the requested materials were received by an attorney for the Department in discovery, this office concludes that the Department has not shown by clear and convincing evidence that the requested records are exempt under section 7(1)(a) of FOIA.

Rules of Professional Conduct

Section 3.6(a) of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct 3.6(a) (effective January 1, 2010)) provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter.

Additionally, section 3.6(d) of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct 3.6(d) (effective January 1, 2010)) provides: "No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)." Notably, Rule 3.6 also acknowledges a legitimate public interest in disclosure of law enforcement records:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. *On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate*

interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

(Emphasis added.) Ill. R. Prof. Conduct 3.6, Committee Comment 1 (adopted July 1, 2009).

Section 3.8 of the Illinois Rules of Professional Conduct of 2010 states:

The duty of a public prosecutor is to seek justice, not merely to convict. The prosecutor in a criminal case shall:

* * *

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that pose a serious and imminent threat of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rules 3.6 and 3.8 of the Illinois Rules of Professional Conduct of 2010 prohibit prosecutors and law enforcement personnel from making statements outside of court that could threaten the fairness of a pending adjudication. Although the State's Attorney's Office argues that the difference between a public release of records and a public statement "is a distinction without a difference," this office is unaware of any authority which concludes that providing a FOIA requester with records constitutes an extrajudicial statement.² Indeed, "FOIA is consistent with the Rules of Professional Conduct because Section 7(1)(d)(iii) of FOIA exempts records if their disclosure would 'create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing.'" Ill. Att'y Gen. PAC Req. Rev. Ltr. 10319, issued January 18, 2011, at 3. As described above, the Department has not made that required showing under section 7(1)(d)(iii). Thus, these rules do not prohibit the Department from providing a FOIA requester with records concerning a criminal case. Because the Rules of Professional Conduct cited do not specifically prohibit the Department from providing the requester with the responsive records,

²Letter from Robert B. Berlin, State's Attorney, DuPage County, to Neil P. Olson, Assistant Attorney General (April 12, 2016), at 3.

the Department failed to sustain its burden of demonstrating by clear and convincing evidence that the rules exempt the responsive records from disclosure pursuant to section 7(1)(a) of FOIA.

LEADS Information

The Department asserted that it redacted certain information obtained through the Law Enforcement Agencies Data System (LEADS). Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code §1240.80(d) (2016), last amended at 23 Ill. Reg. 7521, effective June 18, 1999) provides that "LEADS data shall not be disseminated to any individual or organization that is not legally authorized to have access to the information[;]"³ *see also Better Gov't Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶27 (2014) ("The regulations make it clear that the public is not entitled to view or possess data that is transmitted through, received through, or stored in LEADS."). Accordingly, the Department properly redacted LEADS information under section 7(1)(a) of FOIA.

Section 7(1)(b) of FOIA

Section 7(1)(b) exempts from disclosure "[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2014), as amended by Public Acts 99-78, effective July 20, 2015), defines "private information" as:

[U]nique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

The Department redacted a driver's license number, a personal telephone number, a home address, and a personal license plate number from the responsive records. As set forth in section 2(c-5), driver's license numbers, personal telephone numbers, home addresses, and personal license plate numbers are "private information" that may be properly redacted under section 7(1)(b) of FOIA. Accordingly, the Department properly redacted this information.

³That provision implements section 7 of the Illinois Criminal Identification Act (20 ILCS 2630/7 (West 2014)).

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Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." The exemption defines "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information."

The Public Access Bureau has consistently determined that an individual's date of birth is highly personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 20376, issued August 31, 2012. Therefore, the Department's redaction of dates of birth was permissible under section 7(1)(c) of FOIA.

The Department's primary basis for asserting 7(1)(c) appears to be to protect the identities of witnesses providing information to the Department. As described above, this office has determined that such information may be withheld under section 7(1)(d)(iv). Accordingly, this office does not address the applicability of section 7(1)(c) other than to dates of birth.

In accordance with the conclusions of this letter, this office requests that the Department furnish [REDACTED] with records with additional un-redacted information, namely the information provided by Department employees that is not exempt from disclosure under section 7(1)(d)(iv). The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this file. If you have any questions, please contact me at nolson@atg.state.il.us or (217) 782-9078.

Very truly yours,

[REDACTED]
NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

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